

ORIGINAL

No. 87-7098

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

ANTHONY KEITH JOHNSON,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

RESPONDENT'S BRIEF IN OPPOSITION
TO CERTIORARI

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EDITOR'S NOTE

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QUESTIONS PRESENTED FOR REVIEW

- I. SHOULD THIS COURT GRANT CERTIORARI WHERE NONE OF THE ISSUES PRESENTED WERE RAISED OR DECIDED BELOW?
- II. ARE PETITIONER'S STATEMENTS REGARDING THE JURY OVERRIDE PROVISION OF ALABAMA'S 1981 CAPITAL MURDER STATUTE MISLEADING AND INCORRECT?
- III. SHOULD THIS COURT GRANT CERTIORARI WHERE PETITIONER'S CONTENTION THAT THE JURY OVERRIDE PROVISION CONTRIBUTED TO AN UNRELIABLE DETERMINATION OF GUILT IN HIS CASE IS BASED ON ASSERTIONS NOT SUPPORTED BY THE RECORD?

PARTIES

The caption contains the names of all parties in the court below.

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OPINIONS BELOW

Petitioner's conviction and sentence were affirmed by the Court of Criminal Appeals of Alabama. Johnson v. State, 521 So.2d 1006 (Ala.Cr.App. 1986). The decision of the Court of Criminal Appeals was affirmed by the Supreme Court of Alabama. Ex parte Johnson, 521 So.2d 1018 (Ala. 1988).

JURISDICTION

The Court has no jurisdiction in this case because none of the questions presented were raised in the court below.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VIII

Excessive bail shall not be required, nor excessive fines be imposed, nor cruel and unusual punishment be inflicted.

United States Constitution, Amendment XIV
(in pertinent part)

no state shall... deprive any person of life, liberty or property, without due process of law...

STATUTORY PROVISIONS INVOLVED

Code of Alabama 1975, § 13A-5-40(a)(2)

- (a) The following are capital offenses:
- (2) Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant;

Code of Alabama 1975, §13A-5-47(e)

(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

STATEMENT OF THE CASE

A. Statement of the Facts

On March 11, 1984, petitioner shot and killed Kenneth Cantrell during the course of robbing Mr. Cantrell.

B. PROCEEDINGS BELOW

Petitioner was indicted in June 1984 by the Grand Jury of Morgan County, Alabama, for the capital offense of murder during a robbery in the first degree in violation of Code of Alabama 1975, §13A-5-40(a)(2). A jury found petitioner guilty of this offense.

A sentence proceeding was then held before the jury, which recommended a sentence of life imprisonment without parole by a vote of nine-to-three. Upon consideration of the aggravating and mitigating circumstances, however, the trial court rejected the jury's recommendation and sentenced petitioner to death.

Petitioner's case was appealed to the Court of Criminal Appeals of Alabama, which affirmed the conviction and sentence. Johnson v. State, 521 So.2d 1006 (Ala.Cr.App. 1986). A petition for writ of certiorari was granted as a matter of right by the Supreme Court of Alabama, which on February 8, 1988, affirmed the decision of the Court of Criminal Appeals. Ex parte Johnson, 521 So.2d 1018 (Ala. 1988).

SUMMARY OF ARGUMENT

The Court should deny certiorari because the questions presented by petitioner were not raised or decided below.

Petitioner's general statements regarding the jury override provision of Alabama's 1981 capital murder statute are misleading and incorrect. Petitioner's arguments regarding the allegedly distorting effect of this provision on the determination of guilt in his case are not supported by the record.

ARGUMENT

I. THIS COURT HAS NO JURISDICTION AS TO ANY OF THE ISSUES PRESENTED BECAUSE THEY WERE NOT RAISED OR DECIDED BELOW.

Petitioner presents several arguments regarding the provision in Alabama's 1981 capital murder statute, Code of Alabama 1975, §13A-5-39 et seq., allowing the trial court to override a jury's recommendation as to sentence. None of these issues, however, were raised or decided in the courts below. Johnson v. State, 521 So.2d 1006 (Ala.Cr.App. 1986), affirmed, 521 So.2d 1018 (Ala. 1988). This Court has no jurisdiction to decide issues raised here for the first time. Street v. New York, 394 U.S. 576, 581-582 (1969); Bailey v. Anderson, 326 U.S. 203, 206-207 (1945). For this reason the Court should deny the petition.

II. PETITIONER'S STATEMENTS REGARDING THE JURY OVERRIDE PROVISION UNDER ALABAMA'S 1981 CAPITAL MURDER STATUTE ARE MISLEADING AND INCORRECT.

Petitioner attacks broadly the procedure under Alabama's 1981 capital murder statute which allows the jury's sentence recommendation to be rejected by the trial court. In doing so petitioner relies on several contentions which are misleading or incorrect.

The authority to override is provided under Code of Alabama 1975, §13A-5-47(e), which reads as follows:

(e) In deciding upon the sentence, the trial court shall determine whether the aggravating circumstances it finds to exist outweigh the mitigating circumstances it finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict, unless such a verdict has been waived pursuant to section 13A-5-46(a) or 13A-5-46(g). While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

Contrary to the suggestion of petitioner's argument, a jury recommendation in Alabama is not meaningless. The jury recommendation is to be considered, and therefore is a factor in sentencing. Unlike in Florida, where a jury's recommendation of life can be rejected only if it is in essence irrational, a jury's recommendation can be overridden in Alabama if it is contrary to the trial court's weighing of the aggravating and mitigating circumstances.

Petitioner's statements regarding appellate review of death sentences in Alabama is also misleading. Because the rule of Tedder v. State, 322 So.2d 908 (Fla. 1975), has no application in Alabama, Ex parte Jones, 456 So.2d 380 (Ala. 1984), cert. denied, 470 U.S. 1062 (1985), the Alabama appellate courts do not inquire in cases of jury overrides as to whether any reasonable person could agree with the jury's recommendation of life. Appellate review of death sentences focuses instead on a more essential question, the appropriateness of the death sentence itself. In doing so the appellate courts must address the following questions:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether an independent weighing of the aggravating and mitigating circumstances at the appellate level indicates that death was the proper sentence; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Code of Alabama 1975, §13A-5-53(b). This is certainly adequate appellate review. See, Proffitt v. Florida, 428 U.S. 242 (1976).

Petitioner asserts that the application of the Tedder rule in Florida "has further served to increase the reliability of the sentencing process" (petition, p.7). This statement is evidently based on the presumption that juries are more reliable as sentencing authorities than judges, and that the recommendation of a jury therefore must be followed almost invariably. In Spaziano v. Florida, 468 U.S. 447 (1984), this Court rejected the notion of the inherent superiority of jury sentencing in capital cases.

Moreover, petitioner's argument that the Tedder rule is constitutionally required is precluded by Spaziano, in which the Court held that capital sentencing by a judge alone is constitutional. If no jury input whatsoever is required, petitioner cannot argue that any particular standard for rejecting a jury's recommendation is necessary.

For the above reasons petitioner's statements regarding Alabama's jury override provision should be rejected.

III. PETITIONER'S CONTENTION THAT THE
JURY OVERRIDE PROVISION CONTRIBUTED
TO AN UNRELIABLE DETERMINATION OF
GUILT IS BASED ON ASSERTIONS NOT
SUPPORTED BY THE RECORD.

Petitioner argues that the jury override provision contributed to an unreliable finding of guilt in his case because, he claims, the jury reached a compromise verdict on guilt under the impression that its sentence verdict of life imprisonment without parole would be binding on the trial court. This claim is based on two factual assertions, neither of which is supported by the record.

Petitioner states first that the jury deliberated for a lengthy period on guilt but only briefly on sentence (petition, pp. 9-10). The record, however, does not reveal the length of time of the deliberations on either conviction or sentence (R. 874-877, 944-950).

Petitioner asserts also that, upon his information and belief, the prosecutor's closing argument at the sentence phase

...consisted of an emotionally wrenching performance replete with biblical references and delivered between sobs with periodic breaks to wipe his teary eyes with a handkerchief.

(petition, p. 11). Because the record on appeal does not contain the sentence argument (R. 924), it cannot be determined whether petitioner's sensational description is in any way accurate. Moreover, even if it could be assumed that the prosecutor's argument at the sentence phase was somehow improper, this would not support petitioner's contention that the determination of guilt was the rest of compromise. The verdict of guilt had been reached before the sentence argument was heard by the jury.¹

A crucial assumption underlying our criminal justice system is that juries follow the instructions given them by the trial judge. Marshall v. Lonberger, 459 U.S. 422, 438 n.6 (1983); Parker v. Randolph, 442 U.S. 62, 73 (1979) (plurality opinion). Petitioner cannot maintain that the jury ignored the repeated instructions to find petitioner guilty only if guilt was established beyond a reasonable doubt (R. 840-850, 856, 858, 861, 863, 865 - 866, 868, 870) based only upon assertions unsupported by the record. Accordingly, the Court should deny certiorari.

¹Interestingly, petitioner does not claim that the argument at the guilt stage, which was recorded (R. 759-836), was in any way improper.

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William D. Little, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of the foregoing brief and argument on the attorney for petitioner by placing said copy in the United States Postal Service, first class postage prepaid, and properly addressed as follows:

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Done this 5th day of July, 1988.

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